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No. 91-1531

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL CZARNECKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the civil forfeiture of petitioner's real property, based on its use in the commission of a drug offense for which petitioner was previously criminally convicted, violates the Double Jeopardy Clause.

2. Whether it was reasonable for police officers to move a truck to a professional garage in order to conduct a warrant-authorized search of the truck that required dismantling it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-11) is unpublished, but the judgment is noted at 953 F.2d 633 (Table). The opinion of the district court granting summary judgment in favor of the United States is reported at 764 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1991. A petition for rehearing was denied on January 30, 1992. The petition for a writ of certiorari was filed on March 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Based on information obtained from confidential informants and a court-ordered wiretap, local police and agents of the Drug Enforcement Administration (DEA) in Providence, Rhode Island, learned that petitioner, Paul Lamoureaux, and Edmund Proulx were involved in the importation and distribution of large quantities of marijuana. On January 5, 1990, the wiretap indicated that Leopold DeMarco, the head of the importation operation, was expecting a delivery. On the following day, DEA agents followed a pick-up truck from DeMarco's home to the airport in Warwick, Rhode Island. From there, they followed the truck to petitioner's home, where the truck pulled into the garage. The agents arrested petitioner, DeMarco, Lamoureaux, and Proulx in the driveway of the house. After Proulx was advised of his *Miranda* rights, he told the arresting agents that he was there to unload marijuana from the truck. Pet. App. 6; C.A. App. 35-36, 41-45.

The agents obtained a search warrant for both the house and the truck. Inside the house they found $33,000 in cash, a triple beam scale, plastic bags, and tape. To search the truck, the officers transported it to a garage in order to have it partially dismantled. In the bed liner of the truck, the agents found 400 pounds of marijuana. Pet. App. 6; C.A. App. 28, 93, 205, 302-303.

Petitioner was charged with possession of 100 kilograms or more of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Thereafter, he moved to suppress various items of evidence, including the marijuana found in the truck. Following an evidentiary hearing, the district court denied those motions. Pet. App. 7, 12-17. On November 27, 1990, petitioner pleaded guilty to a charge of possession

with intent to distribute 100 kilograms or more of marijuana. *Id.* at 6-7. He was sentenced to five years' imprisonment, to be followed by four years' supervised release, and fined $10,000 plus costs of his incarceration and supervised release ($16,986.72 and $4,639.68, respectively). *Id.* at 7.

2. On February 2, 1990, following the seizure of petitioner's residence pursuant to a warrant, the government instituted a forfeiture proceeding against petitioner's real property, pursuant to 21 U.S.C. 881(a)(7).[1] Petitioner and his wife filed separate claims to the property. On May 21, 1991, the district court granted summary judgment in favor of the United States, and subsequently ordered the property forfeited. Pet. App. 7-8.

3. The court of appeals affirmed the forfeiture order in an unpublished decision. Pet. App. 3-11. First, the court found that the government had met its burden of showing "a probable cause belief that there was a 'substantial connection' between the illegal drug activity (including the 400 pounds of marijuana concealed in the truck parked in the garage) and [petitioner's] residence." *Id.* at 8-9. Second, the court rejected petitioner's contention that the marijuana

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[1] 21 U.S.C 881(a)(7) provides in pertinent part as follows:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * *

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment * * *.

found in the truck should have been suppressed because the truck was removed from petitioner's premises before it was searched. Adopting the findings of the district court in denying petitioner's suppression motion in the criminal prosecution, the court of appeals concluded that the removal of the truck was justified by the need to dismantle it in order to search it. *Id.* at 10-11.

Finally, the court of appeals rejected petitioner's contention that the forfeiture of his residence violated his double jeopardy rights because he had previously been punished criminally for the same conduct. Relying on *United States* v. *A Parcel of Land With a Building Located Thereon at 40 Moon Hill Road, Northbridge, Massachusetts (40 Moon Hill Road)*, 884 F.2d 41 (1st Cir. 1989), the court stated that civil forfeiture proceedings are inherently remedial and therefore do not constitute a second punishment. Pet. App. 11.

ARGUMENT

1. Petitioner contends (Pet. 4-9) that the forfeiture of his residence based on its use in drug activity constitutes a second punishment, in violation of the Double Jeopardy Clause as interpreted in *United States* v. *Halper*, 490 U.S. 435 (1989). That contention does not merit this Court's review.

a. In *Halper*, this Court announced a "rule for the rare case" in which a civil money penalty, imposed after the defendant was previously convicted for the same conduct, would violate the Double Jeopardy Clause. 490 U.S. at 449. The defendant in *Halper* was convicted and punished for submitting inflated Medicare claims; the government subsequently sued him for civil penalties based on the same violations. The government's out-of-pocket loss from the false claims

was $585; the civil penalty liability totalled $130,000. *Id.* at 441. Faced with the "tremendous disparity" between the government's loss and the penalty imposed, the Court held that the Double Jeopardy Clause required that the government make an accounting of its "damages and costs to determine if the penalty sought in fact constitutes a second punishment." *Id.* at 448-449. The Court indicated, in the face of the extreme facts before it, that a civil penalty that is so divorced from the government's actual damages could "not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 449.

Halper did not involve the traditional remedy of the forfeiture of items that are used in the commission or accomplishment of crimes, and the principles of *Halper* are not applicable in that context. As the Court explained in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), civil forfeiture statutes have been a fixture in our jurisprudence since before the adoption of the Constitution. Then, as now, such statutes make subject to forfeiture "virtually any type of property that might be used in the conduct of a criminal enterprise." *Id.* at 683. The forfeiture proceeding is deemed "independent of, and wholly unaffected by any criminal proceeding *in personam*." *Id.* at 684, quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

A line of cases decided before *Halper* indicates that civil forfeiture statutes are intended to be civil, remedial measures, and not punitive. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984) (forfeiture of unlicensed firearms discourages unregulated commerce in firearms and removes from circulation firearms used outside regulated channels of commerce); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 237 (1972)

(forfeiture of undeclared imported merchandise prevents forbidden merchandise from circulating in the United States, and provides a reasonable form of liquidated damages). Nothing in *Halper* casts doubt on the principle that civil forfeiture provisions are by their nature remedial, and as such, they do not implicate the Double Jeopardy Clause. See *United States* v. *40 Moon Hill Road*, 884 F.2d 41, 43-44 (1st Cir. 1989) (*Halper* is inapplicable to a civil forfeiture proceeding under 21 U.S.C. 881(a)(7)); *United States* v. *McCaslin*, 959 F.2d 786, 788 (9th Cir. 1992) ("*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government.").

b. Contrary to petitioner's contention (Pet. 5-7), the decision in this case does not conflict with the decision of any other court. In *United States* v. *Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1992), civil forfeitures were not even involved. The defendants claimed that their agreement to pay money penalties for a customs infraction foreclosed a subsequent criminal prosecution, even though they had failed to make the payments that were promised. The court of appeals rejected that claim, finding that no punishment of any kind was exacted by the unfulfilled agreement to pay a civil fine. 950 F.2d at 201-203.

In *State* v. *Casalicchio*, 569 N.E.2d 916 (Ohio 1991), the defendant did object to a forfeiture and the state supreme court held that the forfeiture of the claimant's automobile, after his conviction on drug crimes, violated the Double Jeopardy Clause. The court's holding, however, was based on its conclusion as a matter of state law that the forfeiture provision imposed a criminal penalty and was not a civil,

remedial measure.[2] Unlike that state forfeiture statute, however, the provision at issue here, 21 U.S.C. 881(a)(7), does not require a prior criminal conviction and does not seek to impose punishment; rather, it is applicable to real property that serves as an instrumentality of crime because it "is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a narcotics felony.

Nor is there a conflict between the decision in this case and *United States* v. *Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1991). The holding of that case is that the civil forfeiture of the defendant's residence under federal law does not implicate the Double Jeopardy Clause where the prior conviction was obtained under state law. *Id.* at 38. In light of the court's application of the dual sovereignty doctrine, see *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), the court had no occasion to determine whether the forfeiture was a criminal penalty under *Halper*. 954 F.2d at 37-38. To be sure, the court of appeals did indicate that *Halper* is applicable to civil forfeitures, and it described at some length the analysis that it thought appropriate in that setting.[3]

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[2] The state statute required a conviction for a felony as a condition precedent to the forfeiture. That provision was, therefore, aimed not at the property because it was used in crime, but at the criminal defendant himself. The court thus held that it was intended as an additional criminal penalty for the underlying felony. 569 N.E.2d at 920-921.

[3] The court stated that if the forfeited property "has been used substantially to accomplish illegal purposes, so that the property itself can be said to be 'culpable' or an instrumentality of crime," the forfeiture will not be presumed punitive. 954 F.2d at 36. In contrast, "[w]here the seized property is not itself an instrumentality of crime, * * * *and* its total value is overwhelmingly disproportionate to the value of controlled

As petitioner acknowledges, however, that discussion was "dicta." Pet. 5. The Second Circuit has never applied that analysis in a concrete factual setting.

Moreover, even if the analysis suggested by the Second Circuit (see note 3, *supra*) were applied to this case, it would not assist petitioner. The Second Circuit recognized that a forfeiture of property devoted to crime "will not be presumed punitive," *38 Whalers Cove Drive*, 954 F.2d at 36, given the legitimate historic purpose of forfeiture "to remove instrumentalities of crime from general circulation and prevent further illicit use of harmful objects," *id.* at 35. Petitioner's residence was an integral part of an illegal drug operation. When it was searched, police found $33,000 in cash, a triple beam scale, plastic bags, and tape inside the house, and a load of marijuana in a recently arrived truck in the garage. Pet. App. 6. In light of the use of petitioner's residence as a base for narcotics trafficking, the government was entitled to forfeit it as an instrumentality of crime.[4]

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substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is punitive in nature." *Ibid.*

[4] Petitioner asserts (Pet. 7) that the government did not establish the value of the residence that was forfeited or provide any evidence of the government's cost of investigation. Petitioner, however, cites no authority indicating that such a showing was necessary. Even assuming that those values are relevant where the residence is an instrumentality of crime, unless there is a colorable showing that the civil remedy can be said to be "overwhelmingly disproportionate to the damages" petitioner caused, *Halper*, 490 U.S. at 449, there is no obligation of any kind for the government to put on evidence of its costs. See *38 Whalers Cove Drive*, 954 F.2d at 36. A showing of disproportion is plainly lacking here in light of petitioner's substantial marijuana operation.

2. Petitioner also argues (Pet. 9-13) that the court of appeals erred in holding that the agents acted reasonably in removing the truck to another location in order to search it. He claims that the evidence of the marijuana should have been suppressed in the forfeiture proceeding, and that, without it, there was insufficient evidence to show a substantial connection between his residence and drug activity. That factbound issue does not merit this Court's review.

The court of appeals correctly held that the evidence was admissible. The agents had a warrant that authorized a search for marijuana and that identified the truck as a place to be searched. The search itself necessitated the partial dismantling of the truck in order to open up the liner of the truck bed. Pet. App. 14. Based on the testimony of an experienced mechanic that the truck could not have been safely or effectively searched without the special equipment and expertise available only at a service station, the district court found that it was reasonable to seize the truck and take it to where it could be searched safely and conveniently. Pet. App. 14-15.

Petitioner argues that the warrant did not authorize the seizure and removal of the truck to another location. This Court has held, however, that a warrantless search of an automobile, if it is supported by probable cause, may be conducted at another location from the one where the car was originally stopped. *Chambers* v. *Maroney*, 399 U.S. 42, 52 & n.10 (1970). The Court noted in that case that "[i]t was not unreasonable * * * to take the car to the station house" because the occupants had been arrested in a dark parking lot late at night, and moving the car to the police station served the interests of safety, practicality, and convenience. *Id.* at 52 n.10. In this case, the search of the truck was authorized by a

warrant, and the district court similarly found that the complexity of the search required moving the truck for reasons of safety and convenience. Given that the police had authority to search the truck, *Chambers* establishes that the Fourth Amendment does not prevent seizure of the truck for a search at a professional garage.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Moreover, even assuming that suppression is available in the remedial civil forfeiture proceeding here, cf. *United States* v. *Janis*, 428 U.S. 433, 447 n.17 (1976), suppression would be inappropriate where the officers reasonably relied on a valid warrant to authorize the search. *United States* v. *Leon*, 468 U.S. 897 (1984). At the very least, the officers' reliance on the warrant was reasonable. The marijuana found in the truck was therefore clearly admissible.